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7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
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12  
13 IN THE MATTER OF THE )  
EXTRADITION OF )  
14 PATRICK JOSEPH MCCABE )

NO. CR 10-90622-MISC-SI (MEJ)

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DEFENSE PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
AND OBJECTIONS TO THE  
GOVERNMENT'S PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

19 The defense respectfully submits the following proposed  
20 findings of fact and conclusions of law, and its objections to  
21 the United States proposed findings of fact and conclusions of  
22 law. The defense reserves the right to amend, supplement, or  
23 modify these proposed findings of fact and conclusions. As an  
24 initial matter:  
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1 A. The defense respectfully objects to all of the findings  
2 of fact and conclusions of law submitted by the United  
3 States. The defense asserts the findings of fact are  
4 false, and the conclusions of law are invalid, and  
include citations to cases that have been overruled and  
citations to cases with the assertion that the case  
stands for a proposition which it clearly does not.

5 B. At the conclusion of the hearing on August 4, 2010, it  
6 is counsel's recollection that Magistrate Judge James  
7 did not request that the parties submit findings of  
8 fact and conclusions of law. Improperly, the United  
9 States submitted, without asking leave of court and  
10 without any motion to the court, its findings of fact  
and conclusions of law. We ask that these improperly  
submitted findings of fact and conclusions of law,  
which were not requested by the court, be stricken from  
the record.

11 C. Below are the defense proposed findings of fact and  
12 conclusions of law.

13 I.

14 **FINDINGS OF FACT**

15 1. Patrick McCabe is an Irish national born September 12,  
16 1935. He is 74 years old and in the Northern District of  
17 California at 866 ½ Walnut Street, in Alameda, California.

18 2. No evidence has been presented by the government that  
19 this Patrick McCabe is the same Patrick McCabe accused of the  
20 offense of indecent assault in Ireland.

21 3. Between October 2, 2009 and May 5, 2010, two Irish  
22 district courts issued a total of ten warrants for Mr. McCabe's  
23 arrest. During this time period Mr. McCabe was in contact with  
24 both Irish authorities via his Irish lawyer, Donough Molloy, and  
25 U.S. authorities through defense counsel, who contacted the U.S.  
26 Attorney's office in San Francisco in October of 2009. Over the  
27 span of several months, defense counsel for Mr. McCabe contacted

1 the U.S. Attorney regarding Mr. McCabe's matter, eventually  
2 arranging for a self surrender. At no time was Mr. McCabe  
3 attempting to evade or flee. He timely self-surrendered pursuant  
4 to that agreement on July 30, 2010, later complied without  
5 exception to every requirement of his electronic monitoring and  
6 house arrest from July 30, 2010 to August 4, 2010 when he timely  
7 made his second court appearance well knowing that he4 could be  
8 remanded. The charges allegedly stem from the complaints of six  
9 men who allege that Mr. McCabe committed the crime of indecent  
10 assault between 1973 and 1981. None of these alleged complainants  
11 signed an affidavit personally, the documents in the extradition  
12 packet are signed by Irish police, rather than by the actual  
13 complainants themselves.

14 4. The alleged complainants are Thomas Lawrence, an  
15 individual who supposedly reported this indecent assault first to  
16 his sister after waking up in a hospital from a drug overdose,  
17 who has a lifetime history of alcohol and drug abuse; Andrew  
18 Canavan; James Moran, who himself was investigated and never  
19 charged for attempting to extort money from the Dominican order  
20 in Ireland; Frank Lacumbre; Barry Ennis' and Anthony Corrigan..  
21 All complainants allege that they do not have an exact  
22 recollection of when the incidents occurred, but can only purport  
23 to suggest a possible time period during which they believe the  
24 indecent assault occurred.

25 5. Mr. McCabe never made any attempt to flee any  
26 prosecution in Ireland. There is an allegation, unsupported by  
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1 any actual evidence, that Mr. McCabe left the Irish jurisdiction  
2 in which charges had been lodged against him in the United States  
3 Extradition Packet. This allegation is not supported by the  
4 affidavit from the Peter McCormick, a Solicitor and a  
5 Professional Officer in the Office of the Director of Public  
6 Prosecutions. Peter McCormick, in his affidavit attached to the  
7 Extradition Packet states in section 18 that further complaints  
8 were received in June 1988 against Mr. McCabe, but the Irish  
9 police (The Garda Siochana) did not have an address for Mr.  
10 McCabe so apparently no charges were filed.

11 6. Interpol located Mr. McCabe in Alameda, CA in 2003.

12 7. In 2007, Mr. McCabe was interrogated, by Irish police  
13 and Alameda police officers, in Alameda, California, for 3 days  
14 straight, up to 6-7 hours per day, without being advised of his  
15 right to counsel, his right to contact the Irish consulate, and  
16 without being advised of his right to remain silent, as required  
17 by United States Federal law.

18 8. Dr. William Sellman is Mr. McCabe's primary care  
19 physician and has treated him since 2007.

20 9. Following a triple bypass surgery, Dr. Sellman began to  
21 treat Mr. McCabe in the hopes of prolonging his life.

22 10. Dr. Sellman submitted a letter to this Court, dated  
23 October 29, 2010, indicating that he had been following Mr.  
24 McCabe's medical conditions since 2007. These conditions include  
25 the following: Diabetes with neurological manifestations;  
26 peripheral vascular disease; coronary artery disease; elevated  
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1 prostate specific antigen; elevated blood pressure; sciatica.

2 11. Dr. Sellman indicated in his letter that Mr. McCabe  
3 takes two medications daily, Glipizide and Januvia.

4 12. Dr. Sellman testified that daily monitoring of blood  
5 sugar and diet is necessary to prevent Mr. McCabe's physical  
6 condition from deteriorating, together with appropriate  
7 medications.

8 13. Dr. Sellman testified that Mr. McCabe requires a daily  
9 regimen of physical, and, preferably, full body cardio-vascular  
10 aerobic exercise such as bicycling, walking, or yoga, to prevent  
11 Mr. McCabe's physical condition from deteriorating.

12 14. Dr. Sellman testified that Mr. McCabe has an enlarged  
13 prostate which requires daily monitoring, treatment, and  
14 potential surgery - or his physical condition will deteriorate.  
15 He further testified that this condition requires Mr. McCabe to  
16 repeatedly have to urinate throughout the day.

17 15. Dr. Sellman reached the conclusion, in his letter, that  
18 given Mr. McCabe's underlying conditions, particularly with  
19 respect to his heart, he is susceptible to stresses including  
20 illness, medication, and emotional stresses. The doctor went on  
21 to say that the current legal situation has been burdensome both  
22 emotionally and physically. He further stated in his letter that  
23 "I do not feel that Mr. McCabe would be able to tolerate  
24 incarceration from a physiologic and emotional perspective. His  
25 propensity to deteriorate, particularly with respect to his  
26 cardiac condition, is high, and would be higher in an unattended  
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1 and stressful environment."

2 16. Dr. Sellman submitted a second letter on Mr. McCabe's  
3 behalf dated July 26, 2010 and testified at the bail hearing on  
4 this matter on August 4, 2010. He clearly testified that he  
5 stood by his opinions expressed in both letters.

6 17. Dr. Sellman testimony was consistent with his letter,  
7 in that he reiterated that if Mr. McCabe is incarcerated his  
8 condition will seriously deteriorate, and particularly he will  
9 deteriorate if his various health conditions and complications  
10 are left untreated.

11 18. The United States submitted a declaration from a Dr.  
12 Harold Orr, the regional medical director of the for profit  
13 corporation, Prison Health Services, which is contracted to  
14 provide medical services to the Santa Rita Jail.

15 19. In this declaration, Dr. Orr indicated that he had  
16 briefly reviewed Mr. McCabe's medical records and letters from  
17 Mr. McCabe's doctors.

18 20. Dr. Orr had never seen Mr. McCabe or examined him.

19 21. Counsel for the defense filed with the court numerous  
20 documents and newspapers articles which show that Dr. Harold Orr  
21 and the for profit prison health corporation for which he works,  
22 PHS Corrections Health Care, has been accused of providing  
23 substandard inmate care, resulting in inmate deaths, lawsuits,  
24 and investigations of the corporation nationwide.

25 22. Counsel submitted an article showing that 40 inmates  
26 had died in custody between 2002 and 2007 in Alameda County Jails  
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1 and quoting Dr. Harold Orr stating that he believed these inmates  
2 had obtained appropriate care.

3 23. Counsel submitted newspaper articles illustrating how  
4 Dr. Orr and PHS Corrections Health Care had lost contracts with  
5 county governments and had been investigated by political  
6 officials nationwide for repeatedly providing substandard care  
7 resulting in inmate deaths.

8 24. Counsel submitted a Feb. 27, 2005 New York Times  
9 article entitled "Prison Health Care in Jails Can Be A Death  
10 Sentence," an article, that specifically focused on Prison  
11 Health Services, the corporation which oversees health services  
12 at Santa Rita Jail.

13 25. The dual criminality showing at this juncture of the  
14 proceedings was not sufficiently strong to warrant a release on  
15 bail for special circumstances, pursuant to *In the Matter of the*  
16 *Extradition of Jose Luis Munoz Santos*, 473 F. Supp. 2d 1030 (C.D.  
17 Cal. 2006).

18 26. The arguments relating to probable cause, at this  
19 juncture of the proceedings, were not strong enough under *Santos*,  
20 to amount to special circumstances.

21 27. The testimony of Dr. Sellman and the medical documents  
22 submitted, was not sufficient to grant Mr. McCabe bail on special  
23 circumstances grounds. Specifically, without proper treatment,  
24 Mr. McCabe would physically deteriorate but such deterioration  
25 will not occur at Santa Rita Jail, because, based on the  
26 declaration of Dr. Harold Orr, and the information the court  
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1 received from the U.S. Marshal, the capabilities of Santa Rita  
2 Jail to care for an individual with Mr. McCabe's health issues  
3 and problems are sufficient and adequate.

4 II.

5 CONCLUSIONS OF LAW

6 1. There is an extradition treaty in force between the  
7 United States and Ireland.

8 2. The U.S. has received a formal request for the  
9 extradition of one, Patrick McCabe.

10 3. Under Irish Law, indecent assault is a crime that  
11 includes 3 elements. Those elements are (a) that the accused  
12 intentionally assaulted the victim; (b) that the assault or the  
13 assault and the circumstances accompanying it are proved to be  
14 indecent according to the contemporary standards of right minded  
15 people; (c) that the accused intended to commit such an assault  
16 as referred to in (b) above.

17 4. There are United States laws that outlaw the sexual  
18 assault of children.

19 5. The Supreme Court has repeatedly struck down statutes  
20 based on contemporary standards of right minded people as  
21 unlawful restrictions on the First Amendment Freedom of Speech.  
22 See *Janet Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communication*  
23 *v. FCC*, 492 U.S. 115 (1989). This Irish statute under which Mr.  
24 McCabe is charged would not be found to be constitutional under  
25 United States Federal Law as it is void for vagueness and  
26 substantially overbroad. See *Skilling v. United States*, 130 S.



1 Ct. 2896 (2010).

2 6. Under the doctrine of dual criminality, extradition is  
3 only proper if the conduct complained of is criminal under the  
4 laws of the requesting and requested nations. *United States of*  
5 *America v. Zulquarnan Khan*, 993 F. 2d 1368, 1372 (9th Cir. 1993);  
6 citing to *United States v. Van Cauwenberghe*, 827 F. 2d 424, 428  
7 (9th Cir. 1987); *Quinn v. Robinson*, 783 F. 2d 776, 791-92 (9th  
8 Cir. 1986).

9 7. Granting bail in extradition cases pending the  
10 completion of the proceedings has been the rule rather than the  
11 exception. *Bealieu v. Hartigan*, 430 F. Supp. 915, 916 (D.Mass),  
12 rev'd mem., 553 F. 2d 92, vacated other grounds, 554 F.2d 1. Bail  
13 is often granted in extradition cases where special circumstances  
14 are found. See *In the Matter of the Extradition of Jose Luis*  
15 *Munoz Santos*, 473 F. Supp. 2d 1030 (C.D. Cal. 2006) (Santos was  
16 accused of serious offenses in Mexico, including homicide of a  
17 child, he had led police on 30 minute chase in the U.S. when they  
18 tried to arrest him, bail was granted in the amount of a \$450,000  
19 property bond posted by Santos father, he was placed on home  
20 detention, referred to pretrial services); *United States v.*  
21 *Taitz*, 130 F.R.D. 442 (S.D. Cal. 1990) (Taitz was charged with  
22 434 counts of fraud in South Africa, released on \$500,000 bail  
23 secured by a property bond, with a finding of special  
24 circumstances based on health condition, allergic reaction to  
25 corn sweeteners, common in food at the jail, allergic reaction to  
26 soap used in the jail, no prior record, an orthodox Jew and  
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1 unable to carry out religious rituals in custody); *Matter of the*  
2 *Requested Extradition of Kirby*, 106 F. 3d 855 (9th Cir. 1996)  
3 (Kirby was released on \$1 million dollar bond in 1996 and was  
4 subject to electronic monitoring. His co-participants in the Maze  
5 Prison Break were also released, both on \$500,000 bond. Another  
6 co-participant, James Smyth had been out on bail for a year. The  
7 court allowed bail even though it found that special  
8 circumstances were weak. All of these men were accused of being  
9 members of the IRA, a terrorist organization in the view of the  
10 United Kingdom. Kirby was granted bail even though he had  
11 participated in a violent prison break and was in prison for the  
12 murder of a petrol station attendant. (See Exhibit 1, "IRA Men  
13 Can Challenge Extradition," BBC News Online Article, October 10,  
14 1998); see also *United States v. Ramnath*, 533 F. Supp. 2d 662  
15 (E.D. Texas 2008) (Dr. Ramnath released on bail, accused of  
16 manslaughter in the UK); *In the Matter of the Extradition of*  
17 *Morales*, 906 F. Supp. 1368 (S.D. Cal. 1995) (released on \$150,000  
18 bond); *In the Matter of the Extradition of Huerta*, 52 F. Supp. 2d  
19 725 (W.D. Louisiana 1999) (released on \$100,00 bond and  
20 electronic monitoring, accused of Mexican bank robbery); *Hu Yau-*  
21 *Leung v. Soscia*, 649 F. 2d 914 (2nd Cir. 1981) (released on bail,  
22 accused of two home invasion armed robberies in Hong Kong); *In*  
23 *the Matter of the Extradition of Kamel Nacif-Borge*, 829 F. Supp.  
24 1210 (D.Nev. 1993) (released on bail of \$12,453,744.00); *In re:*  
25 *The Matter of the Extradition of Father Markey*, 2010 U.S. Dist.  
26 Lexis 14390 (N.D. Indiana, 2010) (Father Markey accused of 2  
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1 counts of child rape, released on \$10,000 bail with a court  
2 finding he had special circumstances warranting bail based upon  
3 medical deterioration concerns). See also *Salerno v. United*  
4 *States*, 878 F. 2d 317 (9<sup>th</sup> Cir. 1989) (special circumstances  
5 include deteriorating physical condition while in custody); *In re*  
6 *Extradition of Molnar*, 182 F.Supp. 2d 684 (N.D. Ill.  
7 2002) (combination of factors which, individually may not amount  
8 to special circumstances, in combination, amount to special  
9 circumstances; factor which is a "weak" special circumstance is,  
10 nonetheless, a special circumstance).

11 8. *In re Artukovic*, 628 F. Supp. 1370, 1375 (C.D. Cal.  
12 1985), is a case that held that an individual whom the U.S.  
13 government is seeking to extradite, must be competent to assist  
14 in the preparation of his own defense and that "he must be able  
15 to understand the nature of the proceedings against and to  
16 participate intelligently to the extent his participation is  
17 required. *In re Artukovic* was overruled by *Lopez-Smith v. Hood*,  
18 121 F. 3d 1322 (9th Cir. 1997), which held that competence is not  
19 relevant and necessary in extradition proceedings.

20 This case never addressed special circumstances.

21 9. *In the Matter of the Extradition of Kamel Nacif Borge*,  
22 829 F. Supp. 1210, 1216 (D. Nev. 1993), the court held that  
23 "courts are now recognizing that the cumulation of several  
24 factors may constitute special circumstances that would justify  
25 bail in extradition proceedings." Citing to *United States v.*  
26 *Taitz*, 130 F.R.D. 442 (S.D. Cal. 1990).

1           10. Nacif Borge was granted bail in his case, but not on  
2 the basis of his serious health claim due to the fact that he had  
3 presented no documented medical evidence. *Nacif-Borge*, 829 F.  
4 Supp. 1210 at 1217.

5           11. Based on the showings at this juncture, the dual  
6 criminality argument is not strong enough under *Santos* to amount  
7 to special circumstances.

8           12. Based on the showings at this juncture, while  
9 deteriorating physical condition in custody is a special  
10 circumstance under the law, Mr. McCabe has not shown that his  
11 physical condition will deteriorate while in custody because he  
12 has not rebutted the government's showing that he will receive  
13 adequate treatment.

14   Respectfully submitted,

15 Dated: August 5, 2010

**BAY AREA CRIMINAL LAWYERS, PC**

16   By: /s/ David J. Cohen  
17   DAVID J. COHEN, ESQ.

18   Attorneys for Defendant  
19   **Patrick McCabe**